Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	**WC Docket No. 04-36**
IP-Enabled Services	)	
	)	

COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

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Pursuant to the Notice of Proposed Rulemaking published by the Commission on March 29, 2004 regarding Internet Protocol ("IP") - Enabled Services,[1] the Office of the Attorney General of Texas ("Texas OAG") files these comments addressing questions raised by the Commission regarding public interest concerns implicated by IP-enabled services including universal service policies, access charges, disability access, public safety, consumer protections, and consumer privacy interest which should be afforded to subscribers of Voice over Internet Protocol ("VoIP") or other IP-enabled services.

VII. Summary and Scope of Comments

As a fundamental premise, the Texas OAG supports the Commission's efforts to create regulatory stability in order to encourage the continued development and deployment of innovative VoIP services to the mass retail market which begin with the premise that IP-enabled services should be minimally regulated.

That approach does not require that fundamental public interest concerns be neglected. Particularly as VoIP services are marketed as replacements for Plain Old Telephone Service ("POTS") and as increasing numbers of consumers migrate to IP-enabled services, concerns

[1] *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, adopted February 12, 2004, rel. March 10, 2004 ("*IP NPRM*"); *See* 69 Fed. Reg. 16193, March 29, 2004.

which have historically advanced network reliability and public safety, such as universal service, maintenance of the public switched telephone network ("PSTN"), network access for the disabled, access to 911 service, consumer protections, and consumer privacy interests, have relevance.

As the broadband market continues to expand and more customers migrate to VoIP service, the cost of universal service and maintenance of the PSTN will fall on consumers that remain on the PSTN, unless some action is taken. For this reason, the Texas OAG urges the Commission to ensure that VoIP services that send traffic to the PSTN contribute to universal service and are assessed equitable access fees for using local facilities. Universal service is only one of several public policy programs that should apply to VoIP services. In addition, the Commission should ensure network access for the disabled, and establish minimum quality of service standards (including access to 911 service) for VoIP services that are marketed as replacements for POTS. Furthermore, there is a well developed body of consumer protection law at the state and federal level. The Commission should not erect any preemption barrier to state enforcement of such consumer protection laws and regulations as they relate to VoIP and other IP-enabled services. Finally, VoIP services present new ways of manipulating customer personal, financial, and medical information. The Commission should consider initiating a new rulemaking proceeding to address privacy interests unique to VoIP service subscribers.

VIII. Cost-Shifting of Universal Service and Maintenance of PSTN to Stranded Consumers

It is a well accepted maxim that universal service and inter-carrier compensation polices have long been inter-related. As the telecommunications industry continues to evolve from a monopoly to a competitive market, the Commission has endeavored to create universal service polices that are

competitively neutral, as required by federal law.[2] Common sense dictates that as customers migrate from traditional POTS service to VoIP service, the cost of funding universal service policies will stay with customers remaining on the PSTN – in other words, "stranded consumers" who cannot afford a broadband connection or choose not to subscribe to VoIP service. The same is true for the cost of maintaining the PSTN. In order to avoid shifting the cost of universal service and maintenance of the PSTN to *stranded consumers*, the Commission should require VoIP service providers to contribute to universal service and pay some form of equitable access charges for accessing the PSTN.

[2] Section 254(b) of the Communications Act of 1934, as amended, (hereinafter the "Act") sets out a list of seven principles upon which the"Commission shall base policies for the preservation and advancement of universal service," including the principle that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. §254(b)(4). In addition, Congress authorized the Federal-State Joint Board on Universal Service ("Joint Board") and the Commission to establish any additional guidelines that "are necessary and appropriate for the protection of the public interest, convenience and necessity and are consistent with this Act." 47 U.S.C. §254(b)(7). Accepting the recommendation from the Joint Board, the Commission adopted "competitive neutrality" as an additional principle, to ensure that universal service support mechanisms "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Federal-State Joint Board on Universal Service,* Report and Order, 12 F.C.C. Rec. 8776, 8801¶¶46-47 (1997) (hereinafter *Universal Service Order*).

Regarding universal service contributions, section 254(d) of the Act states that "[e]very telecommunications carrier that provides interstate telecommunications service *shall* contribute on an equitable and nondiscriminatory basis" to universal service – this is referred to as the Commission's *mandatory* contribution authority. The same section also provides that "[a]ny other provider of interstate telecommunications *may* be required to contribute to the preservation and advancement of universal service if the public interest so requires" – this is referred to as the Commission's *permissive* contribution authority. In the *IP NPRM,* the Commission raises a fundamental problem: "If certain classes of IP-enabled services are determined to be information services [such as VoIP services], could or should the Commission require *non*-facilities-based providers of such services to contribute to universal service pursuant to its permissive authority? Would such providers 'provide' telecommunications?"[3] Limiting this discussion to VoIP service providers that touch the PSTN, if such VoIP services are information services, they would be outside the scope of the Commission's permissive (and mandatory) contribution authority under section 254(d), which only applies to the provision of *interstate* "telecommunications" and "telecommunications service." Therefore, the Commission must reconcile the diametrically opposite positions between the statute and the "information service" label. Perhaps the Commission can look to its Title I ancillary authority in finding that the public interest requires that VoIP service providers contribute to universal service.

[3] ***IP NPRM* at para. 64.**

Should the Commission fail to address this concern and exempt VoIP service providers from contributing to universal service, the cost of universal service will shift to consumers that remain stranded on the PSTN as other customers migrate to VoIP services via broadband connections. The primary public policy implication of such a result will be to effectively raise telephone rates on low-income consumers who cannot afford broadband connections and on consumers that prefer the reliability of the PSTN (barring some state policy that freezes current local exchange rates). Moreover, failing to address this issue will only encourage faster migration away from the PSTN, as the Commission would maintain an arbitrage opportunity that favors VoIP service providers. From an economic perspective, this is an example of a regulatory-created market distortion that should be eliminated in order to rationalize the access charge regulatory regime.[4]

Turning to carrier compensation, the Commission made the preliminary policy conclusion in the *IP NPRM* that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network … the cost of the PSTN should be borne equitably among those that use it in similar ways." Consequently, the Commission asks, to what extent should access charges apply to VoIP service providers that touch the PSTN? If charges should be assessed on VoIP services, should they be the same as the access charges assessed on providers of telecommunications

[4] For an explanation of the applicability of access charges to enhanced service providers, *see* PETER W. HUBER, MICHAEL K. KELLOGG, & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW, at §12.6.2, 1999 (2nd ed.). (The authors explain that "providers of enhanced services were categorized [by the Commission] as 'customers' of telcos at the outset and have clung tenaciously to that label ever since. The upshot is that they do not pay the steep access charges paid by ordinary (voice) long-distance companies for telecommunications transmissions, even though most Internet and other enhanced service traffic is in fact interstate. ... *All in all, the Commission's enduring discrimination in favor of data (and against voice) makes no economic sense. Access charges for voice are too high; access charges for data are too low. The federal resolution to subsidize universal service entirely out of one stream of traffic and not the other is yet another instance of regulators putting politics above economic efficiency*." (Emphasis added.)

services, or should the charges be computed and assessed differently?[5]

The Texas OAG agrees with the Commission's preliminary policy conclusion for the same reason that it supports a regulatory requirement that VoIP service providers contribute to universal service. Should VoIP service providers that send traffic to the PSTN be exempt from paying some form of equitable access charges, the cost of maintaining the PSTN will likely shift to those customers that remain stranded on the PSTN. Such a policy would result in a further increase in telephone rates to low-income consumers who cannot afford a broadband connection, and consumers that choose not to subscribe to VoIP service.

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[5] ***Id.* at para. 61.**

As with universal service, the problem facing the Commission here is that should VoIP services be considered information services, they would effectively be outside the scope of traditional access charges. This is the case today and is the result of the regulatory-created market distortion discussed above, under which universal service is subsidized from voice traffic only to the exclusion of data traffic.[6] However, unlike traditional switch-based telephone service, which ties the connection between end-users for the totality of the call, VoIP-based services use IP technology to send messages only when the end-users are actually talking. Consequently, the per-minute access charges that apply to interstate telecommunications services today should not apply to VoIP services touching the PSTN.

[6] See discussion in fn 4.

In addition, some critics argue that the current system of inter-carrier compensation "is bloated, untenable, inequitable, and increasingly anticompetitive," due to the large disparity in inter-carrier rates that are accessed by facilities-based carriers "on what is technically the same functionality – originating, transporting, and terminating bits of traffic destined either to or from the network of another provider."[7] Against this back-drop, the Voice on the Net ("VON") Coalition, which represents VoIP service providers and IP equipment manufacturers, has urged the Commission "to move away from a hodgepodge of implicit subsidies and toward a rational series of voluntary inter-carrier business arrangements with regulation required only when there is effective monopoly ownership of a bottleneck [facility]." The VON Coalition favors "bill-and-keep" as the ultimate solution to the inter-carrier compensation question as it relates to all traffic on the PSTN, including VoIP traffic.[8]

[7] *A Bit of Noise: VoIP and Rational Reform of Intercarrier Compensation Policies*, Richard S. Whitt, Director of Federal Law and Policy, WorldCom, Inc. Presented at the NARUC Winter Committee Meetings, Staff Subcommittee on Telecommunications, VoIP Public Policy Seminar, February 22, 2003, available on-line at http://global.mci.com/about/publicpolicy/presentations/. By way of explanation, Mr. Whitt estimated the range of disparity in inter-carrier compensation as follows: (1) Large ILEC Switched Access (Interstate) – 0.6 cents/min; (2) Small ILEC Switched Access (Interstate) – 2.6 cents/min; (3) Large ILEC Switched Access (Intrastate) – 2.5 cents/min; (4) Small ILEC Switched Access (Intrastate) – 5-10 cents/min; (5) CLEC Switched Access (Interstate) – 1.8 cents/min; (6) Rural CLEC Switched Access (Interstate) – 2.4 cents/min; (7) CLEC Switched Access (Intrastate) – 3.0 cents/min; (8) CMRS Switched Access – zero; (9) Cable Telephony Access – same as CLEC rates; (10) Reciprocal Compensation (Non-ISP Traffic) – 0.2 cents/min; (11) Reciprocal Compensation (ISP Traffic) – 0.1 cents/min; and (12) ISP Dial-Up (Local Business Lines) – $40.00/month.

[8] *See Voice on the Net (VON) Coalition Principles* (hereinafter "*VON Coalition Principles*") available on-line at the VON Coalition website, http://www.von.org/principles.asp.

Under a bill-and-keep system, carriers would accept each others traffic on their networks without any exchange of compensation. Such an approach is problematic to rural carriers who depend on access charges and universal service funding to maintain their networks. For instance, the Western Alliance has noted that a "'bill-and-keep' mechanism ... will produce large increases in transport expenses for rural telephone companies, and force them to recover substantial costs currently in access charges via a new or expanded Universal Service Fund mechanism."[9] The Western Alliance argues in favor of reforms that would result in an increase in the subscriber line charge in exchange for elimination of access charges.[10]

The Texas OAG is not endorsing any particular approach for addressing the inter-carrier compensation question, but as this discussion demonstrates, the Commission policy of subsidizing universal service entirely out of voice traffic, and to the exclusion of data traffic (other than reciprocal compensation arrangements for ISP traffic)**, has created an untenable situation with the advent of VoIP service. The current access charge system is inequitable on two levels: (1) it subjects voice services to a range of access charges based on historical categories related to type of service and type of provider, as opposed to function; and (2) it excludes access charges from data services. Under the current system, there is no apparent method for assessing access charges on the basis of how packet-switched bits of data utilize local facilities, as opposed to circuit-switched technology. Further, as the plight of rural carriers shows, the universal service and access charge regulatory regimes should be addressed in unison in order to avoid making reforms in one area, only to see the issues being spilled over into the other area. The Commission should turn to its Title I ancillary jurisdiction and find that the public**

[9] *Ex parte* comments of the Western Alliance, filed in CC Docket Nos. 02-33, 01-92 and 96-45, April 7, 2004.

[10] *Id.*

interest compels VoIP service providers to be subject to a system of inter-carrier compensation consistent with the way IP technology routes traffic to the PSTN. Beyond that, the Commission should rationalize access charges based on the demands that different carriers place on last-mile facilities.

IX. Fundamental Public Policy Responsibilities of VoIP Service Providers

As previously stated, the Texas OAG supports the principle that VoIP service providers should be subject to certain fundamental responsibilities that apply to POTS service. This position is widely held by many industry participants, academics, and public policy researchers.[11] In considering which societal benefits and responsibilities should apply to VoIP service providers, the Texas OAG proposes the following test: Are there existing laws outside the communications arena that impose the same or similar obligation on VoIP service providers? Is there a compelling public policy interest for applying a particular regulation to VoIP services? In the absence of such laws, but where a compelling public interest exists, the Commission should issue specific VoIP-related regulations to protect the general public.

A. Universal Service

For instance, the primary public policy rationale underlying universal service is the notion that universal access to the PSTN increases the value of the network for all end-users. Access to basic communication services for "all" Americans is a necessity in today's information economy. Further, ubiquitous access to communication services enhances all citizens' ability to exercise enumerated Constitutional rights, including freedoms of speech, expression, and assembly which are

[11] *See,* for example*, The Future of Internet Phone Calling: Regulatory Imperatives to Protect the Promise of VoIP for Industry and Consumers*, New Millennium Research Council, December 2003, available on-line at http://www.newmillenniumresearch.org/news/voip_nmrc.pdf; *Balancing the Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition*, An NCTA Policy Paper, National Cable & Telecommunications Association, February 2004; and *VON Coalition Principles*; available on-line at http://www.ncta.com/Pdf_Files/WhitePapers/VoIPWhitePaper.pdf

necessary for a free and democratic society. Outside of the communications arena, there is no law that would require VoIP service providers to meet universal service obligations that currently apply to telecommunications carriers. Nonetheless, there is a compelling public policy interest in requiring VoIP service providers to contribute to universal service in order to avoid shifting the cost of universal service to consumers that remain stranded on the PSTN.

B. Network Access for the Disabled

The societal benefit of ubiquitous access to communications services applies equally to persons with disabilities. For this reason, universal service covers Telecommunications Relay Service ("TRS"), under section 225 of the Act, in order to assist consumers who are visually or hearing impaired to complete telephone calls. As the baby boom generation continues to age, and communications technologies continue to converge voice, video and data into a single IP-based platform, a growing number of Americans with visual and hearing impairments will face the prospect of adapting to new communication and information technologies at home and work. If VoIP service providers are not required to make their services accessible to the disabled community, the Commission runs the risk that a growing number of aging Americans will be excluded from the broadband communications revolution. There are no alternative federal laws or regulations that would impose such a mandate on VoIP service providers. For this reason, and the strong public policy in favor of such access, the Commission should establish minimum requirements for disability access to VoIP services.

C. Minimum Quality of Service Standards

Turning to quality of service, if VoIP service is marketed as a replacement for traditional POTS service, customers will expect similar quality of service. Primary among such expectations is

access to 911 service, although by no means exclusive. Other expectations are likely to include a dial tone, clear signal, calls that are not periodically dropped, access to operator services, access to long distance service, directory listing, and access to customer service. In short, the Commission should establish minimum quality of service standards that apply to VoIP services that are marketed as replacement for traditional circuit switched-based telephone service. In the absence of the Commission taking action on this public interest issue, the industry will be left to determine the appropriate quality of service standards itself through trial-and-error. Consumer access to reliable VoIP communication services that replace wireline service is too important to public safety and to economic development to be subject to a hit-or-miss approach. Here, again, if there are no alternative statutory obligations that would require VoIP service providers to establish minimum quality of service standards, then the Commission should be that standards body.[12] Faced with marketing proposals to replace POTS with VoIP service, the public will expect that some standards body would have established minimum quality of service standards for such claims.

X. Consumer Protections

[12] As the Commission is aware, at least two state public service commissions have taken the position that they have jurisdiction over VoIP service providers based on state statutes that regulate telecommunications service. *See* Before the State of New York Public Service Commission, Case 03-C-1285; *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York State in Violation of the Public Service Law*; Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation, May 19, 2004; available on-line at http://www.dps.state.ny.us; and Before the Minnesota Public Utilities Commission; Docket No. P-6214/C-03-108; *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holdings Corp. Regarading Lack of Authority to Operate in Minnesota*; Order Finding Jurisdiction and Required Compliance; Sept. 11, 2003; available on-line at http://www.puc.state.mn.us/docs/orders/03-0108.pdf. The Minnesota order was subsequently reserved by the United States District Court of Minnesota (8th Circuit) which found that Vonage is providing an "information service," not a "telecommunications service." Civil No. 03-5287(MJD/JGL); *Vonage Holdings Corporation v. The Minnesota Public Utilities Commission, et al.;* Memorandum and Order; Jan, 14, 2004. The case is pending further appeal.

Much of the commentary regarding the regulation of VoIP services focuses on whether such services should be classified as "telecommunications services" or as "information services."[13] The Commission has concluded that some providers of IP-enabled service are "information services" and therefore they are not currently subject to the regulatory obligations imposed upon traditional providers of circuit-switched telecommunications services.[14] Classification of an IP-enabled service as a "telecommunications service," on the other hand, would subject such provider to a wide range of traditional Title II requirements, including Truth in Billing and prohibitions on "slamming" and "cramming" practices, in the absence of the Commission exercising forebearance authority.

For purposes of consumer protections, the Texas OAG suggests that laws and regulations which arose out of legacy telephone service should not be presumed to apply to VoIP services. Rather, the analysis should be one in which there is careful consideration of whether a particular regulatory requirement is necessary to fulfill an important policy objective. This approach is consistent with the view of several Commissioners who have already articulated commitment to "light regulation" of VoIP service.[15]

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[13] *See* 47 U.S.C. §153(46) defining "telecommunications service" and 47 U.S.C. 153(20) defining "information service."

[14] *See Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27 (rel. Feb. 19, 2004).

[15] *IP NPRM*, Statement of Chairman Michael K. Powell. ("Our starting point – and our most important finding – is the recognition that all IP-enabled services exist in a dynamic, fast-changing environment that is peculiarly ill-suited to the century old telephone model of regulation. Competitive market forces, rather than prescriptive rules, will respond to public need much more quickly and more effectively than even the best intentioned responses of government regulators. Indeed, our best hope for continuing the investment, innovation, choice and competition that characterizes Internet services today lies in limiting to a minimum the labyrinth of regulations and fees that apply to the Internet."); *IP NPRM*, Statement of Commissioner Kathleen Q. Abernathy ("I am deeply skeptical about the application of economic regulation to these nascent [IP-enabled] services. Public-utility regulations have traditionally been imposed on local exchange carriers to restrain their market power. Services such as VOIP, by contrast, appear to have low barriers to entry and it does not appear that any provider occupies a dominant market position. ... [N]otwithstanding my interest in maintaining a light touch, I am committed

to ensuring that our regulatory approach meet certain critical social policy objectives. As most policymakers at the federal and state level have recognized, we will need to find solutions to guarantee access to 911 service, the ability of law enforcement agencies to conduct surveillance, the preservation of universal service, and access by persons with disabilities."); and *IP NPRM*, Statement of Commissioner Kevin J. Martin. ("Today's NPRM recognizes the benefits that VoIP brings such as greater efficiency and that the Commission will approach VoIP with a light regulatory touch.")

The Commission should make it clear, however, that generally applicable consumer protection rules that apply to all businesses apply to VoIP service providers. **The states have a long history of regulating against unfair business practices and protecting residents' rights, even *vis-a-vis* telecommunication service providers.[16] Thus, for example, such providers would be subject to the requirements of consumer protection laws of broad application including "no-call" and "no fax" laws and state consumer protection statutes such as the Texas Deceptive**

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[16] The Commission seeks comment on whether "one or more classes of IP-enabled service should be deemed subject to *exclusive* federal jurisdiction with regard to traditional common carrier regulation." *IP NPRM*, at para 41. The Texas OAG strongly encourages the Commission not to take any action that preempts or purports to preempt generally applicable consumer protection statutes.

Congressional intent is the cornerstone of any preemption analysis. If a statute does not contain express preemptive language, Congress' intent to preempt all state law in a particular area may only be inferred where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation," or where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)(citations omitted). In addition, when the regulation is in a field which the states have traditionally occupied, the Courts "start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)(citations omitted).

Consumer protection is an area that is clearly within the states' traditional police powers. Rather than clearly and unambiguously preempting such state laws, the Communications Act of 1934, as amended, evidences Congress's intent not to preempt such state laws. *See e.g., Marcus v. AT&T Corp*., 138 F.3d 46, 54 (2nd Cir. 1998). ("The [Communications Act of 1934] not only does not manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud, it evidences Congress's intent to allow such claims to proceed under state law.")

That is not to say however, that in the past, carriers have not attempted to use Commission regulation to claim preemption to circumvent state consumer protection laws. For example, carriers subject to tariff filing used them in part to attempt to avoid state contract and consumer protection laws. Carriers relied on the judicially created "filed-rate doctrine" to claim preemption of state law challenges to the terms and conditions of services that were filed with the Commission. The Commission responded by instituting detariffing to take away this argument, relying upon state law protections that now are clearly not preempted. Without the filed-rate doctrine as a shield, state courts have already begun striking contract provisions that are in violation of state consumer protection laws. In its detariffing order, the Commission recognized the application of state consumer protection laws to carriers. *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order,* 11 FCC Rcd 20,730 at ¶ 42 ("in the absences of .... tariffs .... consumers will not only have our complaints process, but will also be able to pursue remedies under state consumer protection and contract laws.").

Moreover, the Commission in its Policy Statement on deceptive advertising practices in the area of long distance service, issued jointly with the FTC, specifically noted that the Policy Statement did not preempt existing state laws. *In the Matter of Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers*, 15 FCC Rcd 8,654 at ¶ 10.

The Texas OAG urges the Commission to continue to make it clear that generally applicable consumer protection rules apply to telecommunication carriers and VoIP service providers.

Trade Practices Act which prohibits false, misleading and deceptive acts and practices in the conduct of trade and commerce.[17] Applicability of states' deceptive trade practices laws would enable state attorneys general to take enforcement action against unscrupulous providers.

This approach will benefit both consumers and the industry in that it: (1) allows states to continue to protect their citizens by focusing their enforcement activity only on the unscrupulous (rather than imposing across the board requirements); (2) allows the industry to spot marketing problems which may cause confusion in the marketplace and an opportunity to rectify them; and (3) helps regulators determine, on the basis of actual experience in the marketplace, which areas require specific consumer protection regulations to protect consumer interests and maintain a level playing field among competitors.

[17] TEX. BUS. & COM. CODE § 17.41 *et seq*. (Vernon 1987 & Supp. 2004).

For example, as traffic migrates from the PSTN to IP-based networks and competition among providers intensifies, it is likely that consumers will be faced with aggressive advertising practices and marketing campaigns. In that environment, traditional consumer protection concerns such as truth in advertising will become especially important if consumers are to make informed selections of products and service providers.[18]

[18] For example, if a company markets its VoIP service as a replacement for traditional wireline service, but the company's VoIP service does not provide comparable quality of service to the wireline service, the company may be required to make clear and conspicuous disclosures regarding its services shortcomings.

The Commission's approach to the problems regarding VoIP services should be framed, in part, by its experience with truth in advertising issues which arose in the long distance market in the late 1990's. At that time, the Commission noted that there had "...been an explosion in competition and innovations in the telecommunications industry [and] consumers...reaped substantial benefits in the form of greater choice and lower prices..."[19] The variety of new products being offered and the intense competition for market share, however, also resulted in a proliferation of advertisements and increased numbers of consumer complaints regarding misleading representations in the advertising of these services. In response to this, the Commission and the Federal Trade Commission ("FTC") co-hosted forums on the advertising of long distance telecommunications services in which they brought together industry, consumer groups, state regulators, and law enforcement officers. These forums resulted in the adoption of a Joint Policy Statement on Deceptive Advertising of Long Distance Telephone Services. That statement noted (a) that the Commission had previously found that deceptive and unfair marketing practices by common carriers constituted unjust and unreasonable practices, and were thus unlawful under the Act; and (b) that principles of truth in advertising law developed by the FTC under Section 5 of the FTC Act provided guidance to carriers. The statement went on to establish and discuss specific guidelines for the carriers to follow.

If, on the other hand, the Commission concludes that a certain practice by VoIP providers raises particular problems, the Commission can establish more detailed and specific

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[19] FCC Press Release, March 1, 2000, **available on-line at http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2000/nrmc0009.html.**

regulations. For example, if future experience establishes that consumers of VoIP services are experiencing high levels of cramming or spamming, the Commission may determine that VoIP services should be subjected to the Commission's spamming and cramming regulations, or that separate VoIP spamming and cramming regulations are needed.

V. Subscriber Privacy Interests

Regardless of how the Commission may ultimately classify VoIP and IP-enabled services or classes of services, the Commission must take affirmative steps to ensure strong privacy protections for subscribers of VoIP services. Threats to privacy and a failure to adopt strong and effective privacy safeguards for those who transmit personal messages, confidential business information, and financial and medical records, could undermine consumer confidence in this new service and inhibit its use.

A logical starting point for the Commission's consideration regarding VoIP-related privacy concerns is the Commission's experience pursuant to section 222 of the Act, which regulates customer privacy interests in their information held by telecommunications carriers, known as customer proprietary network information ("CPNI"). CPNI includes what numbers you call, how often you call them , how much you pay to call them, what services you subscribe to, how you use those services, and other personal and sensitive information about an individual's telephone usage. Primarily, it seeks to protect customer privacy by restricting the marketing practices of carriers. Subject to a few exceptions, the Act states that carriers may not use or disclose this information without a customer's approval.[20] The same policy reasons that supported the Commission's

[20] When it comes to the disclosure of information by a carrier to an unrelated third party, Commission rules require an "opt in" approach. Where a carrier seeks to use customer information in marketing its own services to the consumer or those of a joint venture partner, the Commission allows an "opt out " approach. 47 C.F.R. §64.2001 *et*

regulations of CPNI under section 222 apply to VoIP since providers of these services would also be privy to personal and sensitive information regarding usage.

seq.

Furthermore, the technology of IP-related services is such that additional privacy concerns and correspondent protections must be considered so that the prospective benefits of VoIP services are not encumbered by threats to privacy. Given the importance of consumer privacy, the Commission may want to consider a separate rulemaking proceeding which focuses exclusively on those concerns and their possible solutions. Such an approach would be consistent with privacy protection efforts which have been implemented in numerous other areas and fields where beneficial technological developments have brought with them threats to privacy.[21]

VI. Conclusion

The Texas OAG appreciates the opportunity to file initial comments in this important rulemaking proceeding exploring appropriate regulatory oversight of VoIP services, and other IP-enabled services, necessary to protect the public interest. The Texas OAG urges the Commission to ensure that VoIP services that send traffic to the PSTN contribute to universal service and are assessed equitable access fees for using local facilities. Universal service is only one of several public policy programs that should apply to VoIP services. In addition, the Commission should ensure network access for the disabled, and establish minimum quality of service standards for VoIP services that are marketed as replacements for POTS. Beyond that, the Commission should make clear that generally applicable consumer protection laws and regulations that apply to all businesses apply to VoIP and other IP-enabled services, and consider initiating a new rulemaking proceeding to address privacy interests of VoIP service subscribers.

[21] ***See*, for example, Electronic Communication Privacy Act which extended privacy protection to electronic communications, 18 U.S.C. §2510 *et seq*.**; and Health Insurance Portability and Accountability Act ("HIPAA") regulations, 45 C.F.R. §164.500 *et seq*.

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Gabriel Garcia

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